United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1885

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
TYRONE BENJAMIN LARKINS,

Plaintiff-Appellee,

-against-

RUSSELL G. OSWALD, Commissioner of Corrections of New York State; ERNEST L. MONTANYE, Warden of Attica Correctional Facility; LIEUTENANT LEMAR A. CLOR; and SOCIAL WORKER GERALD ELMORE,

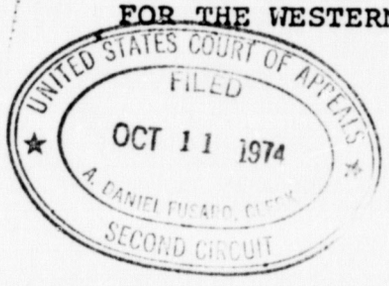
Respondents-Appellants.

B
P/S

Docket No. 74-1885

BRIEF FOR PLAINTIFF-APPELLEE TYRONE BENJAMIN LARKINS

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK



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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal brought by the defendants[1] from an order of the United States District Court for the Western District of New York (The Honorable John T. Curtin) entered on October 5, 1973, granting summary judgment to plaintiff Larkins on the issue of liability, and from a judgment of that same court entered on March 15, 1974, after a jury trial, awarding plaintiff the sum of $1,000.

The Legal Aid Society, Federal Defender Services Unit, was assigned as counsel for plaintiff Larkins, pursuant to the Criminal Justice Act.

Statement of Facts

A. Pro Se Proceedings by the Plaintiff

On June 19, 1972, by means of a verified complaint,[2]

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[1] For the sake of clarity, defendants-appellants will be referred to here as defendants.

[2] The pro se complaint is annexed to appellants' appendix at 5a. Named as defendants in the complaint were Russell G. Oswald, Commissioner of Corrections of New York State, and Ernest L. Montanye, Warden of Attica Correctional Facility, where plaintiff was incarcerated. The formal complaint filed in the district court on March 6, 1973, by assigned counsel for plaintiff added defendants Clor and Elmore, members of the prison adjustment committee, which imposed the unlawful punishment.

plaintiff initiated a pro se civil action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343 seeking immediate release from segregation[3] and $5,000 in money damages, on the ground that he had been wrongfully placed in isolation on June 7, 1972, by the prison adjustment committee for possession in his cell of political materials, in violation of his First Amendment right to freedom of political beliefs.

Upon receipt of this complaint, the District Judge ordered[4] the defendants to report to him "in detail the reasons for petitioner's confinement in segregation and ... indicate whether the safeguards dictated by Sostre v. McGinnis [442 F.2d 187 (2d Cir. 1971)] ... at 198, were followed in the adjustment committee proceeding resulting in petitioner's special confinement."

The defendants, represented by an Assistant Attorney General of the State of New York, then filed an affidavit that

> [i]nvestigation disclosed that certain written materials were found in the cell of the petitioner. These materials were confiscated and, after disciplinary proceedings were conducted, the petitioner was confined to [isolation] ... for a period of seven (7) days.

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[3]The terms "special housing," "HBZ," and "segregation" all refer to isolation from the general prison population, and are used interchangeably infra.

[4]The decision and order, dated June 28, 1973, is annexed as "A" to this brief.

The affidavit of defendants' counsel further states that after Judge Curtin's request for details, defense counsel advised the Deputy Superintendent of Attica Correctional Facility that "it would be preferable not to get into materials and writings which can be characterized as political materials," and further "suggested that [petitioner's] record of confinement in [segregation] be expunged [so as not to have] any unfavorable effect upon petitioner's prison record."

Annexed to defense counsel's affidavit were copies of the materials (App. 23a-29a) confiscated from petitioner's cell and a letter[5] dated July 11, 1972 (after commencement of this proceeding) addressed to counsel from Harold Smith, Deputy Superintendent of Attica Correctional Facility, which states:

> Tyrone Larkins was locked up on a misbehavior report for having inflammatory and revolutionary papers in his possession on June 6, 1972. He was recommended to serve seven (7) days in HBZ [segregation] for possession of this material on June 7, 1972. He was released from HBZ on June 14, 1972[6].
>
> Emphasis added.

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[5] This is not part of defendants' appendix and is annexed as "B" to this brief.

[6] Plaintiff's pro se reply affidavit (App. 9a) asserted, inter alia, that he had been confined to segregation for twelve, and not seven days as a result of the incident.

By order and decision dated September 13, 1972 (App. 10a), the District Court held that the punishment here violated plaintiff's First Amendment rights, and directed that counsel be assigned[7] to represent plaintiff for resolution of the issue of damages.

Some two and a half months later, by "supplementary" affidavit (App. 11a), defendants' counsel asserted, inter alia, that his affidavit of July 13 was not intended to constitute an admission of liability, and offered "to return to the petitioner the four sheets of paper which is [sic] the subject of this litigation."

B. Proceedings with Assigned Counsel

Assigned counsel Conklin filed a formal complaint[8] (App. 13a) dated March 16, 1973, based on the facts set forth in the pro se complaint.

Defendants filed an answer to the formal complaint (App. 16a) in which they denied only that portion of paragraph six "which tends to say that inflammatory and revolutionary papers were not being distributed or published." Also, the

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[7] The District Court assigned Robert B. Conklin, Esq.

[8] The nub of the offense is set forth in paragraph SIX, which states that plaintiff was "confined in isolation [on June 7, 1972] on a misbehavior report for having inflammatory and revolutionary papers in his possession," and that "the written materials ... were found in plaintiff's cell, and said papers were not being distributed or published by the plaintiff at the time of the alleged 'misbehavior report.'"

answer asserted "as an affirmative defense" that defendants "[n]either DENY nor ADMIT paragraphs designated as 'Seventh,' 'Eighth,' and 'Ninth'[9] for the reason that the defendants at all times acted lawfully within the scope of their authority," and "as a further defense," stated that plaintiff had not suffered any damages and that his constitutional rights were not violated. The defendants demanded a jury trial on the issue of damages.

C. Motions for Summary Judgment Pursuant to Rule 56, Fed.R.Civ.P.

(a) Defendants' Motion

Defendants moved for summary judgment (App. 18a-44a) on the grounds that there existed no genuine issue as to any material fact and that they were therefore entitled to a judgment as a matter of law. The prison documents and affidavits

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[9]Paragraph "SEVEN" alleges that plaintiff's imprisonment in segregation from June 7 to June 19, 1972, was ordered by the Attica Adjustment Committee, comprised of defendants Clor and Elmore, and that the defendants Oswald and Montanye, commissioner and warden respectively, "knew, or should have known" that plaintiff was punished for the "reasons and during the period" alleged and that notwithstanding this knowledge, took no action to release him from "punitive isolation."

Paragraph "EIGHT" alleged violation of plaintiff's First, Fifth, and Fourteenth Amendment rights as basis for violation of 42 U.S.C. §1983.

Paragraph "NINE" alleged that plaintiff suffered "psychological and mental distress" by virtue of the improper isolation and loss of yard privileges.

filed in suppcrt of the defendants' motion confirmed, as indeed the plaintiff had alleged in the complaint, that the confinement to segregation was imposed for possession of "inflammatory" writings. The Inmate Misbehavior Report to Superintendent (App. 33a-34a) -- the document which commences prison disciplinary proceedings -- dated June 6, 1974, states:

> Upon observing this man [plaintiff] in the yard with a group of inmates, Officer Tiede[10] and myself frisked this man's cell and found Black Panter [sic] Party papers and revolutionary papers in his cell.

Based on the offense charged in the Misbehavior Report the Adjustment Committee, composed of Elmore and Clor, held a hearing on June 7, 1973, and imposed a punishment of confinement to segregation for seven days, directing further that plaintiff be deprived of all yard and recreation privileges during this period. The Adjustment Committee Report[11] form (App. 32a-33a), which requires the committee to comment on an inmate's "explanation and attitude," reflects the following entry: "belligerent and uncooperative toward institution - inmate admits affiliation to Black Panther Party."

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[10] Officer Tiede also endorsed the report as a witness to the incident.

[11] This report, which was required to be sent to the warden for review, further reflected that plaintiff was to appear again before the adjustment committee on June 14, 1972, and that he had been "locked in cell or in special housing unit" for one day prior to "disposition." Items 6 and 9, Adjustment Committee Report (App. 32a-33a).

The Adjustment Committee Report was then reviewed by the Superintendent. The report of the Superintendent's Action on Review of Adjustment Committee (App. 31a-32a), signed by the Deputy Superintendent, reflects that the matter was reviewed and confirmed by defendant Montanye, Warden of Attica. Plaintiff's official Punishment Record (App. 32a) at the prison reflects the following entry:

> 5-6-72 ... K.[eep] L.[ock] in HBZ 7 days w/no yd. or rec. -- Had in his poss. revolutionary and Black Panther Party papers. Amico.[12]

Emphasis added.

In addition to these reports, annexed to the papers in support of defendants' motion for summary judgment were affidavits prepared in support of the motion by Officers Amico and Tiede and defendant Clor, chairman of the adjustment committee on June 7, 1972. The affidavits of Tiede and Amico (App. 42a-44a) confirm the information contained in the Inmate Misbehavior Report and Punishment Record. The affidavit of defendant Clor (App. 41a) dated April 4, 1973, reflects that the adjustment committee charged plaintiff with two offenses: (1) conducting "a meeting in 'A' Yard during which he impro-

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[12] Also annexed to defendants' moving papers was the Inmate Misbehavior Report to Superintendent as to the inmate Larry Tinsley (App. 39a-40a) who was one of those in the group with whom plaintiff was speaking and whose cell was also searched by Amico and Tiede. Tinsley, who was also charged with possession of inflammatory materials in his cell, was "counseled and released." See Adjustment Committee Report on Tinsley (App. 38a-39a).

perly lectured to the other five (5) inmates in the group, wherein he advocated the disruption and overthrow of the institution" and (2) "possession of inflamatory [sic] written materials."

The affidavit of Lieutenant Clor goes on to allege that plaintiff stated at the hearing that he was "affiliated" with the Black Panther Party, that he "believed in Revolution and that forceful overthrow of existing authority was the only way to achieve certain ends." Clor's affidavit does not allege that plaintiff admitted advocating the forceful overthrow of the prison when he was speaking with the five other inmates in "A" Yard on June 6, nor that plaintiff was confined to segregation for this reason. As to the latter, the affidavit merely states that plaintiff "never denied that he had lectured to the group ... on the advocacy of the overthrow of the institution."

(b) Plaintiff's Cross-Motion for Summary Judgment

In his cross-motion for summary judgment plaintiff agreed with the material facts giving rise to liability as stated in the defendants' motion. Plaintiff's motion stated that since defendants controverted only that portion of paragraph "SIX" of the complaint which implied that inflammatory and revolutionary papers were not being distributed or published, the defendants admitted all other allegations in

paragraph SIX. Fed.R.Civ.P. 8(d). Thus, they admitted that plaintiff was confined in isolation for having inflammatory and revolutionary papers in his possession on or about June 6, 1972, and that these written materials were found in plaintiff's cell.

By neither admitting nor denying the allegations in paragraphs "SEVEN," "EIGHT," and "NINE" of the complaint, the defendants Montanye and Oswald admitted that they knew or should have known of the adjustment committee's action and took no steps to release plaintiff from isolation.

(c) Decision Granting Summary Judgment to Plaintiff on the Issue of Liability

Judge Curtin, agreeing with the contention of all the parties that there was no genuine issue as to material facts, granted plaintiff's motion for summary judgment as to the issue of liability (see Opinion, App. 53a-56a). Viewing the facts in the light most favorable to the defendants, the District Court found: "There is no evidence at all that Larkins had circulated this writing in the institution" and that it was violative of the First Amendment for defendants to punish him for having these documents[13] in his cell.

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[13] As for the contents of the writings, Judge Curtin stated:

> [A]lthough ... extreme in some points, yet many of the aspirations set forth in the papers are hard to fault. The demands relate to freedom, full employment, an end

D. The Trial

Pursuant to defendants' demand, the issue of damages was tried before a jury.[14] During the opening statements, although counsel for plaintiff properly requested simply that his client be compensated "fairly and adequately" for defendants' wrongful conduct (26-27[15]), counsel for defendants advised the jury that there was an upper and lower limit on the amount of damages, the upper limit being $5,000, and the lower limit nothing (27).

Carl Berg, an employee of the New York State Department of Correctional Services, testified on plaintiff's behalf concerning the differences between special housing and general housing at Attica in June 1972. According to Berg, in general population an inmate has the opportunity to be

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to the exploitation of the black community, decent housing, education, the desire for black men to be exempt from military service, an end to police brutality in the black community, freedom for black men held in prisons and a demand that black defendants go to trial before a black jury. These principles are espoused by many individuals in the American community.

[14]Prior to receiving evidence at the trial plaintiff objected to the composition of the panel from which the jury was selected -- two Blacks and twenty-seven Caucasians -- most of whom were middle-aged and from suburban communities surrounding Buffalo -- on the basis that it was not a jury of his peers. The motion was denied.

[15]Numerals in parentheses refer to pages of the trial transcript dated January 25, 1974.

released from his cell to go out into the "yard" for recreation, to socialize, or to exercise (61).[16] On the other hand, he stated that in special housing yard privileges are severely limited, sometimes restricted to the "exercise room," which is an empty room approximately the size of a cell, containing no natural lighting (45). Plaintiff was denied even this meager privilege while wrongfully confined to special housing for twelve days (45).

Berg also testified that the cells in special housing and general population are approximately the same size, six by eight feet; and both contain a sink, light, toilet, metal cabinet, and bed[17] (64-65). Berg further stated that inmates in special housing are deprived of some personal effects permitted to others (62-63).

Plaintiff testified that his confinement to special housing began on June 7, 1972, when guards removed him from his cell in general population. He was not permitted to take along any personal belongings.[18] Before entering special

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[16]The recreation yard consists of a basketball court and areas where one can play handball and lift weights. There are also tables where inmates may play chess and cards or watch television.

[17]The beds in special housing are attached to the wall whereas those in general population are moveable (63).

[18]Later that day, however, plaintiff's legal and personal correspondence, writing implements, and some sneakers were brought to him (73).

housing he was subjected to a strip search, which included a search of his rectum by prison guards (70-71). Thereafter he was taken nude to his cell in special housing where he waited approximately an hour before being given some tattered clothing to wear[19] (72).

During the entire twelve-day period of special housing confinement plaintiff was totally deprived of recreation privileges, including the one-hour daily exercise period required even for those in segretation (77-78). In the twelve days plaintiff was permitted to leave his cell for two medical visits,[20] one attorney visit, and two showers (77-78, 83). Plaintiff testified that while his meals in general population were taken in the mess hall with other inmates in his assigned company, all meals in segregation were delivered to his cell where he ate alone (93-94). While in general population he could fraternize with other inmates in his company in the yard for ninety minutes in the morning and approximately three hours in the afternoon. In special housing he was confined to his cell all day and all night (93-94), and his communication with other persons was limited to speaking through the bars to the person in the adjacent cell (95-96). Plaintiff testified

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[19] In addition to the poor condition of the clothing, plaintiff was not permitted to wear a belt and was given only cloth sandals to wear on his feet despite the coldness and dampness of the cell floor (72).

[20] Plaintiff had requested medical attention prior to his confinement in isolation.

that his confinement in segregation affected him psychologically in that, because of a total deprivation of exercise and fresh air, he lost his ability to concentrate, which prevented him from doing any legal work on setting aside his conviction (85, 89-90).

In an attempt to mitigate damages, defendants called two witnesses, Sergeant McClellan and James DeLong, both Correctional Department employees stationed at Attica. They testified that the cells in segregation and general population are the same size (99, 106), and that plaintiff had been permitted to leave confinement, according to prison records, for three showers and not only two as plaintiff had stated (115). This was the sole defense offered.

During closing statements, while counsel for plaintiff properly never intimated what a fair amount of compensation would be (125), counsel for defendants again alluded to the "upper limit" of damages, as he had done in his opening statement (122). Thereafter the jury returned with a verdict of damages in the amount of $1,000 in favor of plaintiff (153). Immediately thereafter, counsel for plaintiff moved that the judgment be taken jointly and severally against each of the defendants. The issue of personal responsibility on the part of defendants Oswald and Montanye was discussed at length at that time (157-61).

Counsel for defendants acknowledged that prior to trial the court had afforded him an opportunity to re-argue this issue as it related to the liability of defendants Oswald

and Montanye on the motion for summary judgment (160-61). Counsel further acknowledged that he had elected not to pursue this defense, either before or at the trial, and consented to the entry of judgment, jointly and severally, as to the defendants Oswald and Montanye as well as the other defendants (161).

Nonetheless, despite the representations and concessions that the defendants Montanye and Oswald were personally involved, some three and a half months later, on April 15, 1974, the defendants Oswald and Montanye moved for an order "deleting" them as parties to the action. At oral argument on this extraordinary and untimely post-verdict motion, Judge Curtin made the following observations on the record:

> I think, Mr. [Defense Counsel], in fairness to the Court and to [counsel for plaintiff] and the plaintiff here, I simply must state for the record that there were a number of occasions during the trial -- before the trial, during the trial and after the trial was concluded and before judgment was entered in which I asked you whether or not there would be any objection to the plaintiff proceeding against all the defendants here and again and again was given assurance by you that as far as judgment was concerned here it could be entered against all defendants and without going into details of the record it seems to me it is absolutely clear that the plaintiff's counsel and the Court certainly understood that there may be different defenses posed by defendants such as the Commissioner or Deputy Commissioner or

on for summary judgment (160-61).

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> even Warden, that his defenses may be much different from those interposed by a Correctional Officer who is accused of a particular act and I think that the Court bent over backwards in giving the respondents here an opportunity to make their argument and they never did. If they had at any stage the plaintiff would have been on notice and then would have been obliged to bring in additional evidence perhaps to show the relationship between defendant Correctional Officer and defendant Commissioner and because of the fact that you told us that there would be no defense based upon the directions given of Commissioner to Corrections Officer that you would not defend upon the ground that the Commissioner was not responsible for the acts, whatever they were, of the Correctional Officer. We never got into that part of the suit and I am going to deny your motion.
>
> Transcript of proceedings of April 22, 1974, at 12-14.

Judge Curtin also denied the defendants' motion to set aside the jury verdict as excessive.

ARGUMENT

Point I

THE GRANTING OF SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY WAS PROPER.

Defendants contend that it was error to grant plaintiff's cross-motion for summary judgment. They argue that a genuine issue existed as to the material facts, that the order precluded the defendants from asserting immunity and good faith as a defense, and that there was no proof that the defendants were responsible for any more than seven of the twelve days of plaintiff's unlawful confinement.

A. There is no genuine issue as to any material fact.

In support of their contention that disputed factual issues existed here, the defendants direct this Court's attention to three contentions: (1) that "plaintiff was also charged with advocating the disruption of the institution to the inmates he met in the yard;" (2) "that the content of the material taken from his cell (especially the letter) indicated that it was intended to be disseminated to others;" and (3) "that plaintiff's attitude toward institutional policies was belligerent" (Appellants' Brief at 7).

In considering whether summary judgment is an appropriate remedy, the test is whether "there is [a] ... genuine issue as to any material fact...." Fed.R.Civ.P. 56(c). As Justice (then Judge) Cardozo stated:

> The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.
>
> Richard v. Credit Suisse, 242 N.Y. 346 (1926), quoted in 6 Moore's, FEDERAL PRACTICE, §5604 at 2057 (2d ed. 1948).

It should be noted at the outset that this Court, in Dressler v. M.V. Sandpiper, 331 F.2d 130, 132 (2d Cir. 1964) (Kaufman, J.), rejected the stringent use of summary judgment previously espoused by this Court in Colby v. Klune, 178 F.2d 873 (2d Cir. 1949), and Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (on which appellants rely in their brief at 6) in favor of a more liberal application. See also Waldron v. Cities Service Oil Co., 38 F.R.D. 170 (S.D.N.Y. 1965), affirmed, 361 F.2d 671 (2d Cir. 1966), affirmed sub nom. First National City Bank of Arizona v. Cities Service Oil Co., 391 U.S. 253 (1968); 6 Moore's, FEDERAL PRACTICE, §1.02, Supp. 1973 at 53 (2d ed. 1948) However, regardless of whether the stringent or more liberal test is applied here, it is clear that the District Court's action was proper in all respects.

Contrary to the defendants' assertion on appeal,[21] it was not necessary for the District Court to resolve any factual issues in granting summary judgment on the issue of liability. The uncontroverted facts established, as the court below found, that plaintiff was confined to segregation for twelve days for possession of political materials in his cell, in violation of his rights under the First Amendment. Sostre v. McGinnis, 442 F.2d 178, 202-03 (2d Cir. en banc), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978 (1972).

In reply to the District Court's directive to respond "in detail" and "indicate whether the safeguards dictated by Sostre v. McGinnis[22] ... were followed," the defendants replied (App. 7a) that "investigation disclosed that certain written materials were found in the cell of the petitioner," that counsel had instructed prison authorities "not to get into materials and writings which can be characterized as political materials," and that counsel recommended "expungement"[23] of any prison records relating to plaintiff's confine-

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[21] Below, the defendants initiated the request for summary judgment, contending that there was no genuine issue as to any material fact.

[22] Defendants have never disputed, either below or on appeal, that, based on plaintiff's version of the facts, his confinement to segregation for twelve days was violative of his First Amendment rights. Sostre v. McGinnis, supra, 442 F.2d 178.

[23] In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court ordered expungement of an inmate's misconduct record as reflected in prison documents where the misconduct was established at proceedings which did not comply with due process.

affidavits later submitted by the defendants in support of their motion for summary judgment, and therefore must be ignored. Fed.R.Civ.P. 56(c); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); Weyerhauser Co. v. Gershman, 324 F.2d 163 (2d Cir. 1963).

The documents relating to the prison disciplinary proceedings submitted by the defendants on their summary judgment motion further confirm the allegations of the complaint. The Inmate Behavior Report (App. 33a-34a) confirms that the "misbehavior" which resulted in disciplinary charges consisted solely of the possession of confiscated materials seized from plaintiff's cell while he was in the yard. This report, signed by Attica guards Tiede and Amico, who had personal knowledge of the events, states:

> Upon observing this man [plaintiff] in the yard with a group of inmates, Officer Tiede and myself frisked this man's cell and found Black Panter [sic] Party papers and revolutionary papers in his cell.[25]

In addition, plaintiff's official Punishment Record (App. 35a), which the defendants also annexed to their moving papers, reflects that possession of these materials was the sole basis for imposition of confinement after the disciplinary

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[25] These facts were further confirmed by the affidavits of Amico and Tiede, which were also annexed to defendants' motion for summary judgment (App. 42a-44a).

proceedings:

> 6-6-72 ... K.[eep] L.[ock] in HBZ 7 days 2/no yd. or rec. -- Had in his poss. revolutionary and Black Panther Party Papers. Amico.[26]

In the teeth of this overwhelming evidence, the defendants contend that because the affidavit of Lieutenant Clor in support of summary judgment states that plaintiff was "also charged" with advocating disruption of the institution to the inmates in the yard, it was error to grant summary judgment.

The affidavit of the defendant Clor (App. 41a) on which appellants so heavily rely on appeal does not contradict the foregoing evidence. While Clor's affidavit alleges that, in addition to possession of the confiscated materials plaintiff was "also charged" with advocating disruption to the other inmates in the yard, the affidavit does not allege that the latter charge has sustained or that it served as the basis for plaintiff's confinement to segregation. To the contrary, the overwhelming documentary evidence[27] establishes that it was not. Moreover, it is evident from the record, including Clor's affidavit, that there was no evidence to support this charge. Neither plaintiff's acknowledgment of

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[26] The Punishment Record for inmate Tinsley, whose cell was also searched by Tiede and Amico at the same time, also reflects that the basis for disciplinary action was possession of written materials.

[27] Plaintiff's Punishment Record, the Inmate Misbehavior Report, and the Deputy Superintendent's letter, all discussed supra, establish plaintiff's confinement in segregation solely for the possession of inflammatory materials.

of Black Panther Party affiliation nor his failure to deny this charge constitutes proof. Moreover, it is clear from the Misbehavior Report and the affidavits of Amico and Clor that neither overheard the conversation between plaintiff and the other inmates in the yard.

The gravamen of plaintiff's action was that he was confined for possession of the materials in his cell. That he was "also charged" with another offense is irrelevant here since there is no allegation that the other charge was sustained or served as the basis for his confinement. Therefore, assuming that plaintiff was "also charged" with advocating disruption of the institution to other inmates in the yard, the prison documents establish that this was not the conduct for which he was confined to segregation, and nothing in the affidavit of Clor contradicts this. For this reason, Clor's affidavit raises no factual issue affecting the ultimate liability, and therefore the granting of summary judgment here was proper.

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The defendants contend on appeal that the materials "(especially the letter[28])" confiscated from plaintiff's cell were intended for distribution. There is no indication in the record that distribution was intended, nor was it

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[28] The letter (App. 23a) on which the defendants place special emphasis does not refer to the other confiscated materials and makes no reference to overthrow of the institution.

charged by prison authorities. Neither the Inmate Misbehavior Report nor any documents or affidavits submitted by the defendants to the district court alleges that plaintiff intended to distribute these materials, and it is clear from the defendants' offer to return the confiscated materials that the defendants did not believe that plaintiff intended to circulate them or that these materials constituted a threat to the proper functioning of the institution. See Sostre v. McGinnis, supra, 442 F.2d at 202. To the contrary, the documents and affidavits establish that plaintiff was in the yard at the time of the search and that he was confined to segregation solely for possession of the materials found in his cell. As in Sostre, plaintiff was punished

> ... simply for putting his thoughts on paper, with no prior warning and no hint that he intended to spirit the writings out of his cell.
>
> Id., at 202.

3

The defendants' contention that plaintiff was confined to segregation for his "uncooperative" attitude toward the institution is patently frivolous. There was no charge brought against plaintiff on this ground, and there is no basis for this in the record. Indeed, if this were the real reason for plaintiff's confinement to segregation, it would establish a violation of plaintiff's First Amendment rights far more egregious than that complained of here. Nothing

smacks more of the "Star Chamber" than to call an inmate before the adjustment committee, solicit his attitude toward the institution, and then punish him for expressing those beliefs. Indeed, the very Correctional Services regulations on which the defendants rely provide that "Procedures for Implementing Standards of Inmate Behavior ..." have no application unless an inmate violates a "rule or regulation" or "refuses to comply with an instruction" or "engages in some other form of unlawful conduct." 7 N.Y.C.R.R. §250.1; United States ex rel. Haymes v. Montanye, Doc. No. 74-1208, slip op. at 28 (2d Cir., October 4, 1974) (Kaufman, Ch.J.)

The inmate's attitude before the adjustment committee cannot serve as the "unlawful conduct" for which he may be subject to disciplinary proceedings. At most, it is a consideration in determining the severity of the discipline to be imposed.

B. The defendants were not precluded from asserting good faith and immunity below.

Although the defendants were afforded ample opportunity to assert affirmative defenses in their answer and on their motion for summary judgment, none were raised. Instead, defendants alleged that they had acted "lawfully and within the scope of their authority." This raised solely a question

of law for which summary judgment was not only appropriate but, indeed, required. Having failed to raise those defenses below, defendants are precluded from doing so for the first time on appeal. DeBardeleben v. Cummings, 453 F.2d 320, 324-25 (5th Cir. 1972); Glona v. American Guaranty & Liability Ins. Co., 379 F.2d 545 (5th Cir. 1967); see also Engel v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1963).

Indeed, on the facts of this case there was no basis for either defense. As to "good faith," the defendants here were on notice by virtue of this Court's landmark decision in Sostre v. McGinnis, supra, that it is unlawful to punish an inmate for possession of inflammatory writings. The defendants have never disputed the application of Sostre to plaintiff's version of the facts. Yet, despite the firm admonition of this Court, the defendants here imposed segregation for the identical offense.

As to the defense of immunity, in Sostre this Court stated that

> ... state administrative officials ... are not entitled to the protective immunity from a judgment for damages that has been extended to judges (Pierson v. Ray, 386 U.S. 547) ... and legislators (Tenney v. Brandhouse, 341 U.S. 367 (1951); Jobson v. Henne, 355 F.2d 123 (2d Cir. 1966)) ....
>
> Id., at 205, n.51.

See also Haines v. Kerner, 404 U.S. 519 (1972); Hampton v. City of Chicago, 484 F.2d 602, 607 (7th Cir. 1973).

C. The disputed length of plaintiff's confinement goes solely to the issue of damages.

On appeal, the defendants contend that it was improper for the District Court to grant summary judgment because there was no proof that the defendants were responsible for any more than seven days' unlawful confinement in segregation. However, since any period of confinement was unlawful, the added time is likewise unlawful. Further, since the proceeding resulted in seven days' confinement, the additional five days were arbitrary without due process. Wolf v. McDonnell, 42 U.S.L.W. 5190 (June 26, 1974). Thus, this issue is one going only to the question of damages and not to liability. In reserving the issue of damages for the trial, the District Court in no way precluded the defendants from offering proof in this regard.[29]

[29] Despite the full opportunity to mitigate damages afforded at trial, the defendants made no attempt along these lines.

Point II

THE COMMISSIONER OF CORRECTIONS AND THE WARDEN WERE PROPER DEFENDANTS.

The defendants Oswald and Montanye, Commissioner and Warden respectively, argue that the summary judgment as against them was error because there was no proof that either was personally responsible for plaintiff's unlawful confinement in segregation. This argument has no merit.

The decisions of this Court establish that when the complaint in an action pursuant to 42 U.S.C. §1983 alleges that the Warden or Commissioner knew or should have known of the illegal conduct, he is properly named as a defendant. Johnson v. Glick, 481 F.2d 1028, 1034 (2d Cir. 1973). Further, when there is proof of actual knowledge or negligence causing a lack of knowledge a judgment against the defendant is proper (Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972); see also Sostre v. McGinnis, supra, 442 F.2d 179.

In accordance with these clear principles, the formal complaint herein alleges [Paragraph SEVEN] that the defendants Oswald and Montanye "knew or should have known" of plaintiff's unlawful confinement in segregation for twelve days and took no action to effect his release. The defendants did not deny this allegation in their answer. By failing to deny, the defendants have conceded its truth. Fed.R.Civ.P. 8(d). While afforded ample opportunity on their motion for

summary judgment, neither Oswald nor Montanye submitted an affidavit denying such knowledge. To the contrary, the documents submitted in support of the defendants' motion for summary judgment confirm that both knew or should have known of the events. Accordingly, the entry of summary judgment as to the defendants Oswald and Montanye was proper in all respects.

It should be further noted that, despite the obvious propriety of this ruling, the District Judge gratuitously afforded both Oswald and Montanye ample opportunity before trial to reargue the motion for summary judgment on precisely the ground urged on appeal, i.e., that they were unaware of plaintiff's unlawful confinement and were not responsible for the behavior of their subordinates. As the record clearly reflects (see transcript dated April 22, 1974, at 9-14, and transcript dated January 25, 1974, at 154-61), the defendants chose not to avail themselves of this opportunity. Similar opportunities were afforded the defendants during and after the trial; however, on each occasion the defendants chose not to pursue the issue and it was never asserted as a defense. Immediately following the return of the verdict, this very issue was raised and discussed at length by Judge Curtin, and the defendants Oswald and Montanye conceded that this was not an issue, and accordingly consented to entry of the judgment.

It was therefore extraordinary that three and a half months after the verdict the defendants Oswald and Montanye

filed motions to be "deleted" as parties to the action. The Court's observations at that time bear repeating:

> I think, Mr. [Defense Counsel], in fairness to the Court and to [counsel for plaintiff] and the plaintiff here, I simply must state for the record that there were a number of occasions during the trial -- before the trial, during the trial and after the trial was concluded and before judgment was entered in which I asked you whether or not there would be any objection to the plaintiff proceeding against all the defendants here and again and again was given assurance by you that as far as judgment was concerned here it could be entered against all defendants and without going into details of the record it seems to me it is absolutely clear that the plaintiff's counsel and the Court certainly understood that there may be different defenses posed by defendants such as the Commissioner or Deputy Commissioner or even Warden, that his defenses may be much different from those interposed by a Correctional Officer who is accused of a particular act and I think that the Court bent over backwards in giving the respondents here an opportunity to make their argument and they never did. If they had at any stage the plaintiff would have been on notice and then would have been obliged to bring in additional evidence perhaps to show the relationship between defendant Correctional Officer and defendant Commissioner and because of the fact that you told us that there would be no defense based upon the directions given of Commissioner to Corrections Officer that you would not defend upon

> the ground that the Commissioner was not responsible for the acts, whatever they were, of the Correctional Officer....
>
> Transcript of proceedings of April 22, 1974, at 12-14.

Basista v. Weir, 340 F.2d 74, 85 (3d Cir. 1965); see also Fed. R.Civ.P. 16(3).

Furthermore, the assertion that the defendants Montanye and Oswald lacked the requisite knowledge is conclusively foreclosed. Correctional Services regulation, 7 N.Y.C.R.R. §251.4(a), requires that "every incident of misbehavior ... be reported to the superintendent as soon as practicable." This procedure was followed here, as evidenced by the "Inmate Misbehavior Report to Superintendent" (App. 33a), which familiarized the defendant Montanye with the nature of the alleged offense. The "Superintendent's Action on Review of Adjustment Committee Report" (App. 31a) establishes that Montanye, with full knowledge of the facts, confirmed the adjustment committee's illegal action.

Nor can the defendant Montanye avoid personal responsibility for the illegal conduct by asserting (Appellants' Brief at 10) that it was not he, but his deputy, who reviewed this matter. Correctional Service regulation, 7 N.Y.C.R.R. §250.4(a)[30] provides that:

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[30] 7 N.Y.C.R.R. §250.4(b) is a similar provision applicable to employees designated by the Commissioner and thus instructions given by an employee designated to furnish same are deemed to be instructions given by the Commissioner.

> Wherever ... a report is to be made to or instructions are to be requested from the superintendent of a facility, the superintendent may designate an employee to receive such report or to furnish such instructions. ... Instructions given by an employee designated to furnish same shall be deemed to be instructions given by the superintendent.*

Thus, the "Superintendent's Action on Review of Adjustment Committee Report," although signed by a deputy superintendent, has the same force and legal effect as being signed by the Superintendent himself. Since the documents attached to the defendants' motion for summary judgment establish that the defendant Montanye had actual knowledge of plaintiff's unlawful confinement, summary judgment was proper.

Nor can Commissioner Oswald maintain a lack of knowledge. New York Correction Law §137(d) requires each facility superintendent to "fully report" to the Commissioner, at least every five days, all inmates held in segregation. Wright v. McMann, supra, 460 F.2d at 131. It has never been claimed that Montanye failed to comply with this regulation, and therefore Oswald must be charged with knowledge of plaintiff's unlawful confinement by virtue of this report. Oswald too did nothing to effect plaintiff's release. Moreover, since plaintiff was confined a total of twelve days, Montanye would have reported plaintiff's incarceration in segregation to Oswald on at least two separate occasions.[31]

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[31] It should also be noted that by virtue of the above provisions, Oswald and Montanye had knowledge that plaintiff was held in segregation five days longer than the adjustment committee had directed and was permitted by regulation. 7 N.Y. C.R.R. §252.5(e)(3).

Point III

THE JURY AWARD IS NOT GROSSLY EXCESSIVE, AND THEREFORE THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION BY REFUSING TO SET ASIDE THE VERDICT.

The defendants contend that the jury award of $1,000 for confinement in isolation for twelve days in violation of plaintiff's rights under the First Amendment is grossly excessive and that the District Court's refusal to set aside the jury verdict constitutes an abuse of discretion.

The law is clear that a jury verdict must stand unless it is "so grossly excessive as to shock the judicial conscience." Caskey v. Village of Wayland, 375 F.2d 1004, 1007 (2d Cir. 1967). Moreover, in considering whether the District Court abused its discretion in failing to reduce the verdict, this Court may not consider whether it would have decided the motion differently, but rather whether the District Judge abused his discretion[32] in deciding as he did.

> ... Just as the trial judge is not called upon to say whether the amount is higher than he personally would have awarded [footnote omitted], so are we

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[32]Significantly the defendants do not, and indeed can not, cite this Court to any improper rulings during the course of the trial nor to any errors of law in the District Court's instructions to the jury. Nor do the defendants claim that the verdict was the result of inflamed passions, bias, and prejudice on the part of the jury. Thus; the defendants' contention should be evaluated from the viewpoint that they were afforded a fair trial.

> appellate judges not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to let it stand.
>
> Dagnello v. L.I.R.R. Co.,[33] 289 F.2d 797, 806 (2d Cir. 1961).

In assessing damages for violation of civil rights a jury is especially well-suited to make this determination:

> [T]he amount of damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the right.
>
> Basista v. Weir, supra, 340 F.2d at 88, quoting from Wayne v. Venable, 260 F.2d 64, 66 (8th Cir. 1919).

Thus, in cases involving violation of a citizen's civil rights, there is even greater reluctance to set aside a jury verdict[34]

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[33] The defendants erroneously rely (Appellants' Brief at 12) on language in Dagnello, supra, wherein this Court stated "... there must be an upper limit [to damages]," Id., at 806. While this is undeniably so, here it was counsel for the defendants who called to the jury's attention in his opening and closing statements that the "upper limit" of recovery was $5,000. The jury, having returned a verdict of only one-fifth of the "upper limit" suggested by the defendants, defendants should not now be permitted to complain that this amount is excessive. In Grunenthal v. L.I.R.R. Co., 353 U.S. 156 (1968) (cited at 12 of Appellants' Brief), the Supreme Court reversed this Court on the ground that the jury verdict of $305,000 for personal injuries was not excessive, even though the jury award exceeded the amount requested in the complaint by approximately $55,000.

[34] The defendants fail to mention that it was solely at their demand that this case was tried before a jury rather than before the court. Moreover, the defendants' entire argument of excessiveness is based on non-jury cases where the court, rather than a jury, awarded damages.

than there is in other kinds of litigation.

> [I]n the civil rights case ... the jury's verdict is entitled to more weight than in the ordinary case, because of the inherent difficulty in giving such rights a dollar value.
>
> Collum v. Butler, 288 F. Supp. 918 (W.D.Ill. 1968), affirmed, 421 F.2d 1257 (7th Cir. 1970). Emphasis added.

Nominal damages "are presumed" from the wrongful deprivation of a constitutional right. Basista v. Weir, supra, 340 F.2d at 88. And, as the court below found (App. 59a), there was ample evidence introduced to show the difference between incarceration in a segregation unit and incarceration in general population to support the verdict. The jury award of $1,000 is just compensation to the plaintiff for violation of his rights under the First Amendment which resulted in virtually total isolation for a period of twelve days.[35] With the exception of two or three showers, one attorney visit, and two medical visits, plaintiff was locked in his cell twenty-four hours a day for that period.[36]

In addition, the record reflects that, prior to entering segregation, plaintiff was taken from his cell and

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[35] Usual prison routine afforded plaintiff the opportunity of spending at least four and a half hours in the prison yard and meals with other inmates.

[36] It should be noted that while the defendants maintained on the summary judgment motion that plaintiff had been confined in segregation for seven days, at trial they conceded that the period was twelve days, as plaintiff had stated.

forced to submit to a "strip search," which included a probe of his rectum by prison guards. Following this humiliating experience he was marched naked to the segregation cell where he waited an hour before being given clothing.

While the defendants make light of the deprivation of yard privileges for twelve days,[37] it was particularly acute in this case. Under Department of Correctional Services regulations for segregation, 7 N.Y.C.R.R., §301.5, plaintiff was entitled to a minimum of one hour of exercise out-of-doors, weather permitting, each day, or to one hour of exercise in the exercise room. Plaintiff was deprived of this right during the entire time he was in segregation.

Further, plaintiff was kept in segregation twelve days -- five days longer than the adjustment committee directed and five days longer than permitted under prison regulations. 7 N.Y.C.R.R., §252.5(e)(3). The anguish and anxiety caused by this flagrant disregard of due process (Wolf v. McDonnell, supra, 42 U.S.L.W. 5190), as well as plaintiff's well-warranted fear of indefinite confinement to segretaion, are matters for which he was entitled to be justly compensated.

> ... In most cases when a public official denies rights that the

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[37] Defendants' only testimony in mitigation of damages was that the cells in both areas of the prison were the same size and similarly furnished, and that according to prison records plaintiff was taken out of his cell for three showers rather than the two he had acknowledged (99, 106, 115).

> citizen felt were secure under our Constitution, the result is hurt feelings, outrage, embarrassment or humiliation and nominal damages may be awarded for these material consequences of lawless action by state officials.
>
> United States ex rel. Motley v. Rundle, 340 F.Supp. 807, 811 (E.D.Pa. 1972).

The jury award here is reasonable in comparison to awards in other civil rights cases. In Solomon v. Pennsylvania R.R. Co., 96 F.Supp. 709 (S.D.N.Y. 1951), the plaintiff, a black person, was awarded $500 in damages for having to give up her reserved seat in one train car and sit in a car restricted to Blacks. In United States ex rel. Motley v. Rundle, supra, the court awarded nominal and compensatory damages in the amount of $1,000 to a state prisoner because of a racially discriminatory prison policy against Blacks in the assignment of prison jobs. The compensatory damages were to reimburse the prisoner for dental plates, eyeglasses, and law books which he otherwise would have purchased. The remainder of the $1,000 award represented nominal damages for violation of the prisoner's rights under the Fourteenth Amendment. In Sexton v. Gibbs, 327 F.Supp. 13 (N.D.Texas 1970), affirmed, 446 F.2d 904 (5th Cir. 1971), the court awarded $500 nominal damages for violation of the plaintiff's rights under the Fourth Amendment (illegal arrest and search). See also Nixon v. Herndon, 273 U.S. 536 (1927); Adicks v. Kress & Co., 398 U.S. 144 (1969).

In Rhodes v. Horvat, 270 F.Supp. 307 (D.Colo. 1967),

compensatory damages were reduced to $5,000 to compensate plaintiff for outrage occasioned by illegal arrest and detention for forty-five minutes, for missing a date that evening with his girlfriend, and for being called "jailbird" by his colleagues. In McArthur v. Pennington, 253 F.Supp. 420 (E.D.Tenn. 1963), the court awarded $1,700 dompensatory damages for the use of excessive force in making a lawful arrest; and in Arroya v. Walsh, 317 F.Supp. 869 (D.Conn. 1970), Judge Lumbard, sitting as a district judge and trier of facts, awarded $2,500 compensatory damages for the use of excessive force in making a lawful arrest.

It can hardly be said that the $1,000 award here for twelve days of unlawful confinement in segregation is shockingly excessive. The District Judge did not abuse his discretion in refusing to set aside the jury's verdict.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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E. THOMAS BOYLE,
Of Counsel

October 11, 1974

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

TYRONE B. LARKINS,

Petitioner

-vs-

RUSSELL G. OSWALD, Commissioner of Correction of New York State; ERNEST L. MONTANYE, Warden of Attica Correctional Facility,

Respondents

Petitioner pro se.

Petitioner, currently confined at the Attica Correctional Facility, has submitted an application for relief under the Civil Rights Act (42 U.S.C. §1983; 28 U.S.C. §1343).

The Clerk is directed to file petitioner's papers without the prepayment of filing fees.

Petitioner alleges that on June 2, 1972 he was placed in segregation by the Attica Adjustment Committee for having "inflammatory writing" in his cell and that he is therefore being punished for his "political beliefs." See Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

Respondents are ordered to show cause on July 14, 1972 at 10:00 a.m., in Part II of this court at Buffalo, New York, why petitioner should not be allowed to proceed further in forma pauperis. Petitioner need not be present on the return date, but the answering papers shall be served upon him, and he shall thereafter have ten days to reply in writing if he so desires.

The answering papers shall discuss in detail the reasons for petitioner's confinement in segregation and shall indicate whether the safeguards dictated by Sostre v. McGinnis, supra, at 198, were followed in the Adjustment Committee proceeding resulting in petitioner's special confinement.

So ordered.

JOHN T. CURTIN
United States District Judge

DATED: June 28, 1972

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
ATTICA CORRECTIONAL FACILITY
ATTICA, N. Y. 14011

Ernest J. Montanye
Superintendent

July 11, 1972

Hon. Bedros Odien
Assistant Attorney General
State Office Building
65 Court Street
Buffalo, New York 14202

Re: T-26607 T. Larkin

Dear Sir:

T-26607 Tyrone Larkin was locked up on a misbehavior report for having inflammatory and revolutionary papers in his possession on June 6, 1972. He was recommended to serve seven (7) days in HBZ for possession of this material on June 7, 1972. He was released from HBZ on June 14, 1972 and has now been returned to regular status in 10 Company, 14 Cell. At present he is on no-work assignment. He lost no time as a result of this.

Very truly yours,

Harold Smith
Deputy Superintendent

HS:elm

Certificate of Service

October 11, 1974

I certify that a copy of this brief has been mailed to the Attorney General of the State of New York.

E. Thos. Boyle